

**Rawson Contractors, Inc., Franklin Trucking, Inc.
and International Union of Operating Engi-
neers Local No. 139, AFL-CIO, Petitioner.**
Case 30-RC-5034

April 30, 1991

**DECISION ON REVIEW, DIRECTION, AND
ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

At issue here, on review of the Regional Director's Decision and Direction of Election,¹ is whether Rawson Contractors, Inc. (Rawson) and Franklin Trucking, Inc. (Franklin) are joint employers and whether the three Franklin drivers should be included in the collective-bargaining unit with the Rawson employees.²

The Board has considered the entire record in this case and makes the following findings.

Rawson is a Wisconsin corporation engaged in the installation and maintenance of municipal and industrial waterlines. Rawson's four stockholders are brothers Kenneth, Richard, and Robert Servi and their mother, Beth Servi. Since 1983 Rawson and the Petitioner have been parties to a series of collective-bargaining agreements pursuant to Section 8(f) of the Act.³ The expiration date of the most recent contract was May 31, 1990. Franklin was incorporated in 1988 and is engaged in the business of hauling construction materials and fill. At the time of its incorporation, Franklin had the same stockholders as Rawson. In April 1989, Joyce, Barbara, and Mona Servi, the wives of Kenneth, Richard, and Robert Servi, purchased a majority interest in Franklin from Rawson.⁴ Franklin, now operated by Joyce Servi and her sisters-in-law, owns three trucks and employs three drivers.

¹ On April 3, 1990, the Regional Director for Region 30 issued a Decision and Direction of Election. On August 13, 1990, the Board granted the Employer's and the Petitioner's requests for review. The Employer's original request for review was denied as untimely. A mail-ballot election was conducted on May 8, 1990. All the sealed envelopes containing the ballots were impounded pending the Board's Decision on Review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² The Regional Director found appropriate a unit of all full-time and regular part-time equipment operators, mechanics, mechanics assistants, drivers and apprentices employed by the Employer at or out of its Franklin, Wisconsin facility; excluded from the unit were office clerical employees, guards and supervisors as defined in the Act.

³ Under the 8(f) agreements, the Union represented Rawson's heavy equipment operators. At the hearing in the present case, the parties stipulated that all full-time and regular part-time equipment operators, apprentices, and mechanics should be included in any bargaining unit found appropriate.

⁴ The record establishes that in April 1989 Ken Servi and his brothers sold a 75-percent majority interest in Franklin to Joyce Servi and her sisters-in-law. The brothers retained a 25-percent interest in Franklin until the fall when they sold their remaining interest to the Servi women. In this regard, the record establishes that Ken Servi transferred his remaining interest in Franklin to Joyce Servi on September 28, 1989, and that Robert and Richard Servi transferred their remaining interests in Franklin to Joyce Servi on October 1, 1989.

The Regional Director found that Rawson and Franklin are joint employers and that the Franklin drivers share a sufficient community of interest with the Rawson employees to warrant their inclusion in the bargaining unit. The Employer contends that the Regional Director's findings are erroneous. For the reasons set out below, we agree with the Employer that the record does not establish that Rawson and Franklin are joint employers and find that the Franklin drivers should not be included in the bargaining unit.⁵

In reaching his conclusion that Rawson and Franklin were joint employers,⁶ the Regional Director found that Rawson officials exercised substantial control over the terms and conditions of employment of Franklin's drivers. In this regard, the Regional Director found it significant that two of the "prior" Franklin drivers continued to work for the "current" Franklin at the same wages after the Joyce Servi group took over and that Ken Servi played a significant role in hiring the third Franklin driver, Ron Hudy, in May 1989, after the Joyce Servi group had purchased Franklin. The Regional Director also relied on his findings that Ken and Joyce Servi together set Hudy's wages and decided to give the three Franklin drivers a 50-cent-per-hour raise in June 1989. In addition, the Regional Director found it significant that Ken Servi had a "substantial input" in Joyce Servi's purchase of a new Mack truck for Franklin in April 1989. The Regional Director also noted that, while Franklin had no supervisors, Rawson had four working foremen at its various jobsites who directed the Franklin drivers in their work and that the Rawson foremen could recommend the discipline of Franklin's drivers. Further, the Regional Director observed that Rawson officials Ken and Richard Servi shared or codetermined with Joyce Servi the day-to-day dispatching and rerouting of Franklin's drivers. Finally, the Regional Director noted that Rawson and Franklin employees shared the same group insurance and Christmas party, and that they used the same "shop" telephone number to call in sick. Finding that Rawson and Franklin shared in the hiring, setting of wages, and supervision of the Franklin drivers, and that they codetermined other terms and conditions of employment, the Regional Director concluded that the two entities were joint employers.⁷

⁵ Because we find that Rawson and Franklin are not joint employers, we find it unnecessary to reach the issue of whether the Franklin drivers share a sufficient community of interest with the bargaining unit employees to warrant their inclusion in the unit.

⁶ In contrast to a single employer relationship, "the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982). (Emphasis in original.) Whether a company exercises sufficient indicia of control over the employees of another company to be considered a joint employer is essentially a factual issue. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

⁷ In concluding that Rawson and Franklin were joint employers, the Regional Director also relied on his findings that Franklin leases office space

As an initial matter, contrary to the Regional Director, we find that the evidence does not establish that Rawson officials share or codetermine the terms and conditions of employment of Franklin's drivers. Regarding Ken Servi's participation in Hudy's hiring and the setting of wages for Franklin's drivers and his "substantial input" regarding the purchase of the new truck, we note that these events occurred when Ken Servi still retained a financial interest in Franklin. There is no record evidence that Ken Servi participated in any decisions affecting the terms and conditions of Franklin's drivers after the sale of his remaining interest in Franklin was finalized.

As to the Rawson foremen's direction of Franklin's drivers, we also find that this factor does not establish a joint employer relationship between the two entities. In this regard, the Rawson foremen's authority to "discipline" Franklin's drivers is limited to times when the Franklin drivers are working at Rawson jobsites and, while Rawson officials can "yell at" the Franklin drivers and "get on them," they cannot issue warnings to the drivers or impose any other discipline.⁸ Further, we note that Rawson officials have the authority to so "discipline" the drivers of any company that leases trucks to it when the drivers are working at Rawson jobsites and that this is a routine practice in the industry. Thus, when Franklin's drivers are working for a company other than Rawson, that company's officials direct the Franklin drivers while they are working at that company's jobsites. In this regard, Ken Servi testified without contradiction that only 30 percent of Franklin's sales from August to December 1989 came from Rawson, and that in the months of October and November 1989 Rawson leased no trucks from Franklin.⁹ It is clear, therefore, that the Franklin drivers are under the direction of, and subject to "discipline" by,

from Rawson and that, as part of its lease, Franklin "shares" Rawson's one-person office staff, facsimile machine, computer, cleaning service, postage stamps, post office box number, and address. The Regional Director also noted that Franklin rents yard space for overnight parking from Rawson and that Franklin uses Rawson's shop and tools for minor repairs and maintenance of its vehicles and equipment. Because the sharing of the facilities described above is not relevant to the joint employer analysis, we shall not consider this factor in that regard. See generally *NLRB v. Browning-Ferris Industries*, supra at 1122, and *Laerco Transportation*, 269 NLRB 324, 325 (1984). In any event, we note that the Regional Director himself found that Franklin pays Rawson for the lease of space and equipment and that Richard Servi testified without contradiction that Franklin pays fair market value under the lease agreement. In these circumstances, we find that Rawson and Franklin conduct business at arm's length and that they do not "share" office space and equipment.

⁸Although Ken Servi testified that the Rawson foremen had the authority to recommend the discipline of Franklin's drivers, the record does not reveal whether such recommendations were effective. In this regard, we note that there is no evidence in the record that Rawson foremen ever recommended the discipline of any Franklin drivers and that Joyce Servi testified without contradiction that she alone has the authority to discipline the drivers.

⁹In finding that Franklin performed 50 percent of its work for Rawson, the Regional Director relied on Ken Servi's additional testimony to the effect that as of the hearing date Franklin was performing approximately 50 percent of its work for companies other than Rawson. Accordingly, we conclude from these two statements that during the time at issue here Franklin performed between 30 and 50 percent of its work for Rawson.

officials of other companies at least as much as they are by Rawson's foremen. In these circumstances, we conclude that the Rawson foremen's direction and routine "discipline" of Franklin's drivers does not rise to the level of discipline sufficient to establish that Rawson officials share in the control and direction of the Franklin drivers.

Further, while we agree with the Regional Director that Rawson officials direct Franklin's drivers to specific jobsites, the record clearly indicates that Richard and Ken Servi dispatch and reroute Franklin drivers only to Rawson jobsites and only when Franklin's drivers are working for Rawson. The record also establishes that they so direct the drivers of other companies when they are working for Rawson.¹⁰ For all these reasons, we conclude that the record does not establish that Rawson shares or codetermines the essential terms and conditions of employment of the Franklin drivers.¹¹ Consequently, we find that the two entities are not joint employers.¹²

As we have concluded that Rawson and Franklin are not joint employers, we shall exclude the Franklin drivers from the unit. Accordingly, we find that the following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(c) of the Act:

All full-time and regular part-time equipment operators, mechanics, mechanics assistants, and apprentices employed by the employer at or out of its Franklin, Wisconsin facility; but excluding office clerical employees, guards, and supervisors as defined in the Act.

¹⁰We also note that Richard Servi testified without contradiction that while he sometimes tells the Franklin drivers where to report in the morning, he does so according to the written directions of Joyce Servi.

¹¹We find that other factors relied on by the Regional Director do not support his conclusion that Rawson and Franklin are joint employers. As to the sharing of group insurance, Ken Servi testified without contradiction that Rawson does not pay for Franklin employees' group insurance and that Franklin "also" has a group policy. Thus, contrary to the Regional Director, we conclude that Franklin and Rawson employees do not share the same group insurance policy. As to the Christmas party, while Franklin employees did attend the party, several witnesses testified that other truckers and some suppliers also attended the party. Because the party was attended by many individuals who were not Rawson employees, we find the fact that Franklin employees also attended the party does not establish that Rawson and Franklin are joint employers. Finally, while the record supports the Regional Director's finding that Rawson and Franklin employees use the same "shop" number to call in sick, we consider this fact, without more, is not necessarily indicative of joint employer status.

¹²In its statement of position on review, the Petitioner reasserted its pre-hearing position that Rawson and Franklin were "a single employer engaged in a single integrated enterprise," a contention that the Regional Director did not address. Because we find that the ownership of Rawson and Franklin were entirely separate after the sale of Ken Servi's and his brothers' remaining interests in Franklin were finalized, and in the absence of any evidence that the two entities operated at less than arm's length, we conclude that the two companies do not constitute a single employer. See *NLRB v. Browning-Ferris Industries*, supra at 1122.

DIRECTION

It is directed that the Regional Director for Region 30 shall, within 10 days of this Decision on Review and Direction, open and count the impounded ballots cast by the employees in the above-described unit, pre-

pare and serve on the parties a tally of ballots, and thereafter issue the appropriate certification.

ORDER

It is ordered that the above-entitled matter is remanded to the Regional Director for Region 30 for further processing consistent herewith.